

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRED GERARD and ROSE GERARD,
Appellants,

vs.

UNITED STATES OF AMERICA, J. L. SHER-
BURNE and EULA SHERBURNE, husband
and wife, G. S. FRARY and BESSIE L.
FRARY, his wife, W. H. MERCER and
GEMMA N. MERCER, his wife, MILTON
MERCER and CARMA MERCER, his wife,
GUY McCONAHA and IDA McCONAHA, his
wife and FRED SHUPE,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana

No. 11591

United States
Circuit Court of Appeals

For the Ninth Circuit.

FRED GERARD and ROSE GERARD,
Appellants,

vs.

UNITED STATES OF AMERICA, J. L. SHER-
BURNE and EULA SHERBURNE, husband
and wife, G. S. FRARY and BESSIE L.
FRARY, his wife, W. H. MERCER and
GEMMA N. MERCER, his wife, MILTON
MERCER and CARMA MERCER, his wife,
GUY McCONAHA and IDA McCONAHA, his
wife and FRED SHUPE,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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Cut Bank, Montana,

Attorney for Appellant and Plaintiffs.

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United States of America, Appellee.

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Cut Bank, Montana,

Attorney for Defendants,

J. L. Sherburne, et al., Appellees.

MR. H. C. HALL,

Great Falls, Montana,

Attorney for Defendant,

W. H. Mercer, et al., Appellees.

MR. LOUIS P. DONOVAN,

Shelby, Montana,

Attorney for Defendant,

Fred Shupe, Appellee.

MR. LOUIS P. DONOVAN,

Shelby, Montana, and

MR. WILBUR P. WERNER,

Cut Bank, Montana,

Attorneys for Defendants,

Guy McConaha, et al, Appellees. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
District of Montana, Great Falls Division

Civil Action No. 698

ROSE GERARD and FRED GERARD,

Complainants,

vs.

J. L. SHERBURNE and EULA SHERBURNE,
Husband and Wife; FRED SHUPE and
MARY DOE SHUPE, His Wife, if any; GUY
McCONAHA and IDA McCONAHA, His
Wife; W. R. McDONALD and E. MARIE
McDONALD, His Wife; EARL JOHNSON
and MRS. EARL JOHNSON, His Wife; W.
H. MERCER and GEMMA N. MERCER, His
Wife, if any; MILTON MERCER and
CARMA MERCER, His Wife; G. S. FRARY
and BESSIE L. FRARY, His Wife; THE
UNITED STATES OF AMERICA and all
other persons unknown, who claim or may
claim some right, title, estate or interest in the
property described in the bill in equity or com-
plaint, or lien or encumbrance thereon, adverse
to complainants ownership, or any cloud upon
complainants' title thereto, whether such claim
or possible claim be present or contingent, in-
cluding any claim or possible claim of dower,
inchoate or accrued,

Defendants.

BILL OF COMPLAINT

Come now the plaintiffs, Rose Gerard and Fred Gerard, husband and wife. and for their cause of action against the above-named defendants, and each of them, jointly and severally allege as follows:

I.

This is a civil action brought by the above-named plaintiffs, [3] Rose Gerard and Fred Gerard, and the Court has jurisdiction under and by virtue of Section 24 (1) (24) of the Judicial Code, 28 U.S.C., Section 41 (1) (24); Section 345 of Title 25 U.S.C.A. and under and by virtue of various treaties duly entered into and adopted by and between the Blackfeet Tribe of Indians and the United States and particularly the treaty commonly known as the Agreement of 1887, executed February 11, 1887, and ratified May 1, 1888, 25 Stat., 113, (particularly Sec. VI of said agreement) and the agreement commonly known as the Treaty of 1896 with the Blackfeet Tribe of Indians, ratified September 26, 1896, 29 Stat. 358 (particularly Article IX of said agreement); and the General Allotment Act of February 8, 1887, 24 Stat., 388, Section 348 of Title 25 U.S.C.A.

II.

That at all of the times herein mentioned Rose Gerard and Fred Gerard, and each of them, were Indian persons, wards of the United States and under the charge of the Superintendent of the Blackfeet Indian Reservation in the state and district of Montana.

III.

That the defendants, J. L. Sherburne and Eula Sherburne, husband and wife; Fred Shupe and Mary Doe Shupe, his wife, if any; Guy McConaha and Ida McConaha, his wife; W. R. McDonald and E. Marie McDonald, his wife; Earl Johnson and Mrs. Earl Johnson, his wife; W. H. Mercer and Gemma N. Mercer, his wife; Milton Mercer and Carma Mercer, his wife; G. S. Frary and Bessie L. Frary, his wife, are citizens of the United States and all reside at Browning, Montana, except G. S. Frary and Bessie L. Frary, who reside at Cut Bank, Montana, and Fred Shupe and Mary Doe Shupe, his wife, if any, whose last known address is Shelby, Montana; that the defendant, the United States of America, is the guardian of the plaintiff's and by reason thereof has or may claim an interest in the premises involved in this proceeding. [4]

IV.

That Rose Gerard, an Indian Ward of the United States, was allotted the following described land within the state and district of Montana and within the county of Glacier, known as allotment No. 2192, and described as follows:

East Half Southwest Quarter ($E\frac{1}{2}SW\frac{1}{4}$), Southeast Quarter ($SE\frac{1}{4}$) of Section Twenty-eight (28), and West Half Northwest Quarter ($W\frac{1}{2}NW\frac{1}{4}$) of Section Thirty-four (34) in Township 36 North of Range 12 West, Montana Meridian;

That Fred Gerard, also an Indian Ward of the

United States, was allotted the following described land within the state and district of Montana and within the county of Glacier, designated allotment No. 2191, and described as follows:

Lots Two (2), Three (3), Southeast Quarter Northwest Quarter ($SE\frac{1}{4}NW\frac{1}{4}$), Southwest Quarter Northeast Quarter ($SW\frac{1}{4}NE\frac{1}{4}$), East Half Southwest Quarter ($E\frac{1}{2}SW\frac{1}{4}$), West Half Southeast Quarter ($W\frac{1}{2}SE\frac{1}{4}$) of Section Four (4) in Township 35 North of Range 12 West, Montana Meridian.

Each of the foregoing allotments comprise approximately three hundred and twenty (320) acres.

V.

That on February 28, 1918, trust patents were issued to each of the above-named plaintiffs for the above-described lands as designated in the preceding paragraph by the United States pursuant to the provisions of the Treaty of 1887 set out in the preceding paragraph No. I, under the provisions of which agreement the United States specifically promised and agreed as follows:

“Upon the approval of said allotments by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the lands thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of

his decease, of his heirs, according to the laws of the Territory of Montana, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever. And if any conveyance shall be made of said lands, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void:"

That the said allotments were authorized pursuant to the above-mentioned agreement of 1887 by the General Allotment Act of February 8, 1887, 24 Stat. 788, which contains the provision set out by the said agreement to the effect that the United States would hold the land thus allotted in trust for the said allottees for a period of twenty-five years and after the expiration of that time the United States of America would convey the same by patent in fee to the Indian discharged of the trust and free of all charges and encumbrances whatsoever, the relevant portion of said trust patent in each allotment being as follows:

"Now Know Ye, That the United States of America, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of

twenty-five years, in trust for the sole use and benefit of the said Indian and at the expiration of said period the United States will convey the same by patent to said Indian in fee, discharged of said trust and free from all charge and encumbrance whatsoever; but in the event said Indian dies before the expiration of said trust period, the Secretary of the Interior shall ascertain the legal heirs of said Indian and either issue to them in their names a patent in fee for said land, or cause said land to be sold for the benefit of said heirs as provided by law;”

Prior to the expiration of the trust period of twenty-five years on or about the 18th day of June, 1934, the trust period was indefinitely extended by Section 2 of the Act of June 18, 1934, 48 Stat., 984, commonly known as the Wheeler-Howard Bill.

VI.

That thereafter on or about the 11th day of June, 1918, there was issued to said Rose Gerard and also Fred Gerard certain fee patents to the lands and premises described in preceding paragraph No. IV; that the said fee patents so issued on the 11th day of June, 1918, were issued in direct contradiction of and in violation of the promise and agreement of the United States that it would hold the said lands in trust for the said plaintiffs and each of said plaintiffs for a period of twenty- [6] five years and would issue a fee patent until the expiration of such period; that the fee patents, when issued,

were issued without any application being made by the said plaintiffs or either of the said plaintiffs therefor, and were issued to them and each of them without their consent to the issuance of the same. That the fee patents and each of the fee patents so issued were in direct violation of the agreement provisions of Agreement of 1887, cited and referred to in paragraph I hereof, and that the said fee patents did not convey any right, title or interest to the plaintiffs other than that theretofore conveyed by the trust patent for each of said tracts and that the said fee patents should be held to convey only what the agreement and general allotment act of February 11, 1887, authorized for the reason that the said fee patents expressly provided that they were made subject to immunities and restrictions imposed by law. That by reason of the agreement of 1887 heretofore cited and the General Allotment Act of 1887, plaintiffs acquired a vested right of which they could not be deprived, directly or indirectly, by their own voluntary acts or by operation of law, whether by tax deed, voluntary conveyance or otherwise.

VII.

That the complainants are now, and at all times herein mentioned have been, the owners of and entitled to the immediate possession of the lands and premises hereinbefore described which said lands were duly allotted to the complainants and each of them by the United States; that said lands are within the boundaries of said Indian Reservation

in Glacier County, Montana, and that the Blackfeet Indian Reservation belongs to the Blackfeet Indian Tribe and has been set apart to said tribe as an independent unit so recognized by law and by treaty agreements made by and between it and the United States, and that the plaintiffs have and still do keep up their tribal membership and tribal relations [7] and that at all times the said Blackfeet Indian Tribe has been recognized by law as an independent nation and treated as such by the United States; that under the agreement of 1887, above referred to, which said agreement has the effect of a treaty by and between the United States and the Blackfeet Tribe of Indians, these plaintiffs became entitled under the said treaty to the lands and premises allotted to them as set out in paragraph IV of this complaint. That the right of the complainants under the said Agreement of 1887 was subsequently confirmed by Article IX of the Agreement of 1896 which provides as follows:

“The provisions of Article VI of the agreement between the parties hereto, made February 11, 1887, are hereby continued in full force and effect, as are also all the provisions of said agreement not in conflict with the provisions of this agreement.”

That the right of restriction on alienation was and is a vested right that could not be divested by subsequent act of Congress or by issuance of a fee simple patent which did not contain notice of the restriction on alienation provisions of the Agree-

ment of 1887, and the General Allotment Act of February 8, 1887, both of which are cited herein.

VIII.

That after the fee patents were issued Glacier County, Montana, purported to levy and assess said lands heretofore described as the property of the complainants; that the taxes so levied and assessed became delinquent and thereafter Glacier County attempted and purported to sell the same for delinquent taxes and later, by quit claim deed, conveyed the same to W. R. McDonald. That said deed was given on or about the 25th day of October, 1930, and was and is null and void for the reason that the lands were immune from taxation under the Agreements, General Allotment Act, and the specific provisions of the trust patents, and the immunity clause of the fee patent, immune from taxation by Glacier County or the taxing authorities of the state of Montana, and any and all rights [8] or claims of the above named defendants, or either or any of said defendants, were and are null and void and of no effect.

IX.

That neither of the said plaintiffs was ever found competent by the United States to receive a fee patent for the said lands or any part thereof; that they never applied for a patent and never consented to the issuance of a fee patent and that the said fee patent was issued to them within approximately four months after the issuance of the trust patents and was forced upon them by representations of the

officials of the Indian Bureau of the United States in Washington, D. C., and the Indian Agency at Browning, Montana, to the effect that the patent in fee must be accepted and that the lands must be rendered subject to taxation by the taxing authorities under the laws of the State of Montana; that any conveyance or transfer made by the plaintiffs or either of them, by mortgage or otherwise, was never approved by the President of the United States, or by the Secretary of the Interior, or any official of the United States having authority to approve any contract or transfer of real property made by any member of the Blackfeet Tribe of Indians; that if any such transfer was made, the same was null and void under the agreements and statutes hereinbefore cited.

X.

That each of the fee patents issued to the plaintiffs for the respective allotments hereinbefore described in part expressly provides:

“To have and to hold the same, together with all the rights, provisions, immunities, and appurtenances of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever;”

The foregoing clause recognizes the immunities provided by law and the provisions of the trust patent, issued some four months previously, and such construction is in harmony with the [9] General Allotment Act of 1887 and the Agreement of 1887 hereinbefore cited. That any other construc-

tion of the terms of the fee patents renders the issuance of the fee patent null and void and of no force or effect for any purpose.

XI

The plaintiffs further allege that the defendants, J. L. Sherburne and Eula Sherburne, husband and wife, Fred Shupe and Mary Doe Shupe, his wife, if any, Guy McConaha and Ida McConaha, his wife, W. R. McDonald and E. Marie McDonald, his wife, Earl Johnson and Mrs. Earl Johnson, his wife, W. H. Mercer and Gemma N. Mercer, his wife, Milton Mercer and Carma Mercer, his wife, G. S. Frary and Bessie L. Frary, his wife, and each and all of them claim some right, title or interest in or to, or assert some claim, lien or demand upon the real property described in paragraph IV of this complaint superior to the title of each of these plaintiffs; that such claims and assertions of claim are void and of no legal force or effect and that the ownership of the plaintiffs, subject to any claim of title by the United States by virtue of its guardianship of the plaintiffs, is superior to any right, title or interest claimed or that may be claimed by any of the said defendants or of any lien, claim or demand whatsoever of the defendants in and to the same, or any part thereof. That the defendant, the United States, may rightfully claim some right, title or interest in and to said lands by reason of its guardianship of the plaintiffs, but that if the fee patent issued by the United States for the said lands and each tract thereof is construed to remove

immunities and restrictions on alienation by the plaintiffs, then such fee patents were and are null and void for all purposes and should be so adjudged and determined by this Court.

Wherefore, the plaintiffs, and each of them, pray judgment against the defendants and each of them respectfully, as follows: [10]

(1) That the defendants and each of them be adjudged to have no right, title or interest in and to the real property described in this complaint or any lien, claim or demand whatsoever against the same or any part thereof, save and except that any interest the United States may claim as guardian of the complainants.

(2) That the fee patents, issued to the complainants on or about June 11, 1918, be held and determined to have been issued without the application or consent of the complainants, or either of them, and that any right, claim or interest claimed by any of the defendants, except the United States, be determined to have been without any right and null and void for all purposes.

(3) That the complainants be declared to be the owners of the respective tracts claimed by each of the said complainants and to have the right of immediate possession, subject to such right as the United States may have as guardian of the complainants.

(4) That the lands be adjudged to be inalienable, and immune from taxation during the period of restriction on alienation provided by law.

(5) For such other and further relief as the

complainants, or either of the complainants, may show herself or himself to be entitled.

(6) For complainants' costs and disbursements necessarily expended herein.

S. J. RIGNEY,
Attorney for the
Complainants. [11]

VERIFICATION

State of Montana,
County of Glacier—ss.

Rose Gerard and Fred Gerard, each for herself and himself, being separately duly sworn, on oath depose and say: that they are the complainants named in the foregoing entitled action; that each of said Affiants has read the foregoing complaint and knows the contents thereof and that the allegations and matters therein alleged are true of her or his own knowledge except as to those matters stated on information and belief and as to those matters they believe it to be true.

ROSE GERARD,
FRED GERARD.

Subscribed and sworn to before me this 7th day of September, 1945.

[Seal] S. J. RIGNEY,
Notary Public for the State of Montana, residing
at Cut Bank.

My commission expires Feb. 6, 1948.

[Endorsed]: Filed Sept. 20, 1945. [12]

[Title of District Court and Cause.]

MOTION OF DEFENDANT UNITED STATES
OF AMERICA TO DISMISS

Now Comes Harlow Pease, Assistant United States Attorney in and for the District of Montana, and as such, one of the attorneys for the defendant, United States of America, and moves the Court that this cause be dismissed as to the defendant United States of America on the following grounds, to-wit:

I.

That the court does not have jurisdiction of the subject matter of this action.

II.

That the United States of America has not consented to be sued or made party defendant in this cause.

This motion is based upon the complaint in this cause.

HARLOW PEASE,

Assistant United States Attorney in and for the
District of Montana.

[Endorsed]: Filed Nov. 1, 1945. [14]

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the defendants, J. L. Sherburne and Eula Sherburne, husband and wife, and move the court as follows:

I.

To dismiss the action because the complaint fails to state a claim against these defendants upon which relief can be granted;

II.

To dismiss the action because there is a misjoinder of separate causes of action, in that causes of action relating to the separate allotments of the two plaintiffs, Rose and Fred Gerard, have been joined in one complaint, when in fact the causes of action and defenses thereto, respecting each allotment are separate and distinct; the two allotments referred to are described in paragraph IV of the complaint.

Done this 29th day of November, 1945.

LLOYD A. MURRILLS,

Cut Bank, Montana,

Attorney for J. L. Sherburne and Eula Sherburne.

Service of and receipt of copy of foregoing Motion to Dismiss acknowledged this 29th day of November, 1945.

S. J. RIGNEY,

Attorney for Complainants.

[Endorsed]: Filed Nov. 30, 1945. [16]

[Title of District Court and Cause.]

MOTION TO DISMISS

Come Now the above named defendants, G. S. Frary and Bessie L. Frary, his wife, and move to

dismiss the complaint of plaintiffs in the above entitled action upon the ground and for the reason that said complaint fails to state a claim upon which relief can be granted in favor of said complainants, or either thereof, and against these defendants, or either thereof.

H. C. HALL,
414 Strain Building,
Great Falls, Montana,
Attorney for Defendants.

[Endorsed]: Filed Dec. 3, 1945. [18]

[Title of District Court and Cause.]

MOTION TO DISMISS

Come Now the above named defendants, W. H. Mercer and Gemma N. Mercer, his wife, and Milton Mercer and Carma Mercer, his wife, and move to dismiss the complaint of plaintiffs in the above entitled action upon the ground and for the reason that said complaint fails to state a claim upon which relief can be granted in favor of said complainants, or either thereof, and against these defendants, or either thereof.

H. C. HALL,
414 Strain Building,
Great Falls, Montana,
Attorney for Defendants.

[Endorsed]: Filed Dec. 3, 1945.

[Title of District Court and Cause.]

MOTION OF DEFENDANT, FRED SHUPE,
TO DISMISS CIVIL ACTION No. 698

The defendant, Fred Shupe, moves the Court as follows:

(1) To dismiss the action because the Complaint fails to state a claim against this defendant, Fred Shupe, upon which relief can be granted;

(2) To dismiss the action because the right of action, if any, set forth in the Complaint, did not accrue within ten years next before the commencement of this action;

(3) To dismiss the action on the ground that the Court lacks jurisdiction of the subject matter in controversy;

(4) To dismiss the action on the ground that the Court lacks jurisdiction of United States of America, and that United States of America is an indispensable party to the action and it has not consented to be sued or made a party defendant in this cause.

/s/ LOUIS P. DONOVAN,
Shelby, Montana,
Attorney for defendant,
Fred Shupe.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Dec. 13, 1945. [22]

In the District Court of the United States
in and for the District of Montana

Great Falls Division

Civil Action No. 698

ROSE GERARD and FRED GERARD,
Complainants,

vs.

J. L. SHERBURNE and EULA SHERBURNE,
Husband and Wife; FRED SHUPE and
MARY DOE SHUPE, His Wife, if any; GUY
McCONAHA and IDA McCONAHA, His
Wife; W. R. McDONALD and E. MARIE
McDONALD, His Wife; EARL JOHNSON
and MRS. EARL JOHNSON, His Wife;
W. H. MERCER and GEMMA N. MERCER,
His Wife, if any; MILTON MERCER and
CARMA MERCER, His Wife; G. S. FRARY
and BESSIE L. FRARY, His Wife; THE
UNITED STATES OF AMERICA and all
other persons unknown, who claim or may
claim some right, title, estate or interest in the
property described in the bill in equity or com-
plaint, or lien or encumbrance thereon, adverse
to complainants' ownership, or any cloud upon
complainants' title thereto, whether such claim
or possible claim be present or contingent, in-
cluding any claim or possible claim of dower,
inchoate or accrued,

Defendants.

SUMMONS

To the above named Defendants (except the United States of America):

You are hereby summoned and required to serve upon S. J. Rigney, plaintiffs' attorney, whose address is Cut Bank, Montana, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

September 20th, 1945.

[Seal]

H. H. WALKER,
Clerk of Court.

By C. G. KEGEL,
Deputy. [25]

MARSHAL'S RETURNS ON SERVICE OF
SUMMONS

District of Montana—ss.

I hereby certify and return, that on the 5th day of January, 1946, I received the within Summons and that after diligent search, I am unable to find the within-named defendants Fred Shupe and Mary Doe Shupe within my district.

GEORGE A. WRIGHT,
United States Marshal.
By BERNARD J. REILLY,
Deputy United States
Marshal.

United States of America,
District of Montana—ss.

I hereby certify and return that I served the annexed Summons on the therein-named Guy McConaha and Ida McConaha by handing to and leaving (two true and correct copies thereof with copies of complaint attached) with their daughter Betty McConaha Olsen at the usual place of abode personally at 25 miles N. Browning in said District on the 7th day of January, A.D. 1946.

GEORGE A. WRIGHT,
United States Marshal.
By BERNARD J. REILLY,
Deputy.

United States of America,
District of Montana—ss.

GERARD v. SHERBURNE, et al.

I hereby certify and return that I served the annexed Summons with copy of Complaint attached on the therein-named G. S. Frary and Bessie L. Frary by handing to and leaving a true and correct copy thereof with them personally at Browning in said District on the 19th day of November, 1945.

GEORGE A. WRIGHT,
United States Marshal.
By EDGAR TAYLOR,
Deputy. [26]

United States of America,
District of Montana—ss.

GERARD v. SHERBURNE, et al.

I hereby certify and return that I served the annexed Summons with copy of Complaint attached on the therein-named J. L. Sherburne and Eula Sherburne at Browning in Glacier County, Montana, by handing to and leaving a true and correct copy thereof with them personally at Browning in said District on the 19th day of November, 1945.

GEORGE A. WRIGHT,
United States Marshal.
By EDGAR TAYLOR,
Deputy.

District of Montana—ss.

GERARD v. SHERBURNE, et al.

I hereby certify and return, that on the 17th day of November, 1945, I received the within Summons and that after diligent search, I am unable to find the within-named defendants Earl Johnson and Mrs. Earl Johnson within my district.

GEORGE A. WRIGHT,
United States Marshal.
By ETHEL FLEMING,
Deputy United States
Marshal.

United States of America,
District of Montana—ss.

I hereby certify and return that I served the annexed Summons, with copy of Complaint attached on the therein-named W. R. McDonald by handing to and leaving a true and correct copy thereof with him personally at Browning in said District on the 14th day of November, 1945.

GEORGE A. WRIGHT,
United States Marshal.
By DEAN O. WOOD,
Deputy. [27]

United States of America,
District of Montana—ss.

I hereby certify and return that I served the annexed Summons, with copy of Complaint attached on the therein-named E. Marie McDonald by handing to and leaving a true and correct copy thereof with W. R. McDonald, her husband, at her home personally at Browning in said District on the 14th day of November, 1945.

GEORGE A. WRIGHT,
United States Marshal.
By DEAN O. WOOD,
Deputy.

District of Montana—ss.

I hereby certify and return, that on the 14th day of November, 1945, I received the within Summons

and that after diligent search, I am unable to find the within-named defendants W. H. Mercer, Gemma N. Mercer, Milton Mercer and Carma Mercer within my district. Reported to be at Prosser, Wash.

GEORGE A. WRIGHT,
United States Marshal.
By DEAN O. WOOD,
Deputy United States
Marshal.

[Endorsed]: Filed Jan. 18, 1946.

[Title of District Court and Cause.]

MOTION OF DEFENDANTS, GUY McCONAHA
AND IDA McCONAHA, TO DISMISS
CIVIL ACTION No. 698.

The defendants, Guy McConaha and Ida McConaha, move the Court as follows:

(1) To dismiss the action because the Complaint fails to state a claim against these defendants, Guy McConaha and Ida McConaha, upon which relief can be granted;

(2) To dismiss the action because the right of action, if any, set forth in the Complaint, did not accrue within ten years next before the commencement of this action;

(3) To dismiss the action on the ground that the Court lacks jurisdiction of the subject matter in controversy;

District of Montana—ss.

(4) To dismiss the action on the ground that the Court lacks jurisdiction of United States of America, and that United States of America is an indispensable party of the action and it has not consented to be sued or made a party defendant in this cause.

/s/ LOUIS P. DONOVAN,
Shelby, Montana,

/s/ WILBUR P. WERNER,
Shelby, Montana,

Attorneys for defendants,
Guy McConaha and
Ida McConaha.

[Affidavit of service by mail attached.]

[Endorsed]: Filed June 22, 1946. [30]

In the District Court of the United States
in and for the District of Montana
Great Falls Division
Civil Action No. 698

ROSE GERARD and FRED GERARD,
Complainants,

vs.

J. L. SHERBURNE and EULA SHERBURNE,
husband and wife; FRED SHUPE and MARY
DOE SHUPE, his wife, if any; GUY Mc-
CONAHA and IDA McCONAHA, his wife,
et al.,

Defendants.

DECISION

The above-entitled cause, pending on motions to dismiss by the several defendants, is substantially the same case that was before the court on motions of defendants to dismiss over a year ago, with the exceptions that the United States is here added as a party defendant and some of the parties named in the first case as complainants have been omitted. (No. 525, Gerard v. Mercer, et al., 62 F. Supp. 28.) Six motions to dismiss on the part of defendants have now been submitted to the court for consideration, and most of the objections to the complaint in the first case have been re-asserted. Motions to dismiss in the first case were granted, and no appeal taken, otherwise the several objections raised to the

complaint in this case might have been disposed of, and duplication of effort avoided. Counsel for complainants claim authority under Title 25, Sec. 345, U. S. C. A. for making the United States a party defendant in this case.

In the other case (*Gerard et al. v. Glacier County et al*, *supra*, and hereinafter referred to as the first case) the court dwelt at considerable length on the question of whether the United States should be regarded as an indispensable [33] party to the action, without deciding in what manner the United States could be brought into the action as a party, but that its presence was indispensable. Under some of the authorities there cited it would seem possible that such a result might be attained by making the United States a party defendant as in the present action; but such a course is seriously challenged by counsel for the defendants, and authorities have been presented, some allegedly in favor of and others against, the right of the complainants to proceed in this manner. Counsel for complainants strongly rely upon *Arenas v. U. S.*, 322 U. S. 419, 429, as a precedent in point and favorable to their contention. That the above decision is based upon an entirely different state of facts would seem clear from a comparison. In the *Arenas* case the statute cited as a basis for the decision (25 U. S. C. A. 345) was directly in point, and applied specifically to the principal fact in question which was the withholding from the Indian plaintiff of his allotment, to which he seemed rightfully entitled, and which was shown to be long overdue.

In the first case the court held that the United States was an indispensable party to the action, and is now of the same opinion. In this action the United States Attorney has moved for a dismissal on the ground that the United States cannot be sued therein without its consent, and that such consent has not been given, and counsel further contend that such act is without legal effect, and that no statute or authority exists authorizing it. Great stress has been laid upon the decision in the United States v. Eastman, 118 F. (2) 421, 423, Certiorari denied, 314 U. S. 635, in which the Circuit Court of Appeals for this Circuit in an opinion by Judge Healy held that the statute there in question (Title 25, Sec. 345, U. S. C. A.) was intended only to compel the making of an allotment in the first instance, and the [34] language used is: "The trial court thought that leave to sue the United States is found in the Act of August 15, 1894, as amended, 25 U. S. C. A. Sec. 345. We are not able to agree. It is plain from the whole statute that Congress intended merely to authorize suits to compel the making of allotments in the first instance. Here the allotments have already been made. Should the view taken below be approved and the scope of the statute thus enlarged by judicial construction the Government may find itself plagued with suits of Indians dissatisfied with the administration of their individual holdings. Enlargement of the right to sue the Government for the redress of grievances of this character is solely a function of Congress. The suit as against the United States should have been dismissed."

In that case the Indian allottees claimed to have the right to sell timber on their allotments without restriction or charge, and that regulations of the Secretary of the Interior were without legal force. The Indians made the United States a party and sought to enjoin the enforcement of these regulations. The material parts of the statute above cited are set forth so that the full force and meaning of its terms may be considered; it is labeled: "Actions for Allotments", and states that all persons described therein who are entitled to an allotment of land under any law of Congress, or "Who claim to have been unlawfully denied or excluded from any allotment, or any parcel of land, to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole, or in part, of Indian blood or descent, to any [35] allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to any allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him. * * *"

The last sentence above quoted, as well as other

parts of the Act, would clearly indicate that the sole purpose of this statute is to authorize the Indian to bring a suit against the United States to require the Secretary to make an allotment of land to him, which he may assert has been denied to him or from which he has been excluded, and to which he claims to be lawfully entitled by virtue of some Act of Congress. It was said in the *United States v. U. S. Fidelity and Guaranty Co.*, 309 U. S. 514: “* * * It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial power. Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.”

The purpose of the present action is to quiet title and set aside and annul patents in fee which were issued by the United States, under authority of an Act of Congress, to the complainants about twenty-seven years ago, and which they now assert were issued to them without their application or consent. The court is unable to understand how the language of the above statute can be so construed as to authorize the complainants to sue the United States in the present action without consent in the first instance, or how an [36] action can be maintained unless by intervention or by an action voluntarily

instituted by the United States as plaintiff against the above-named defendants. That the United States is an indispensable party seems to have been demonstrated by citation of authorities in the first case, but it does not clearly appear therefrom how the presence of the United States as a party to such an action is to be accomplished. In speaking of the obligation of the Government to act promptly in protecting the rights of the Indian, the court held in *Maknomen County v. The State of Minnesota*, 131 F. (2) 936, 938, 939, that “* * * in the strict and diligent performance of its trust, the United States should have applied to its courts for decree or decrees avoiding the apparent lien of taxes illegally assessed * * * but time does not run against the sovereign and its right to resort to its courts in aid of the performance of governmental obligation is not restricted to any particular form of action* * *.”

Counsel for complainants state that if the court does not find authority to sue the United States in Title 25, Section 345 as interpreted by the Supreme Court in *Arenas v. United States*, *supra*, then such authority will be found by implication in *United States v. Hellard*, 322 U. S. 363, 368, wherein the court said: “But as stated by Mr. Justice Brandeis speaking for the court in *Minnesota v. the United States*, *supra*, p. 388, authorization to bring an action involving restricted lands confers by implication permission to sue the United States.”

The question in the *Hellard* case was whether

full-blooded Indians of the Five Civilized Tribes could be divested of title to restricted land by a sale in partition proceedings to which the United States was not a party: "A full blood Creek Indian died leaving heirs of the full blood. They inherited certain lands from her, lands which were subject [37] to restrictions on alienation both in her hands and in the hands of the heirs. By Section 2 of the Act of June 14, 1918 (25 U. S. C. A. Sec. 355, 40 Stat. 606) Congress declared that such lands were "made subject to the laws of the state of Oklahoma, providing for the partition of real estate." By Section 3 of the Act of April 12, 1926 (44 Stat. 239) Congress provided for the service upon the superintendent for the Five Civilized Tribes of a prescribed written notice of the pendency of any suit to which a restricted member of the Tribes in Oklahoma or the restricted heirs of grantees are parties and which involves claims to "lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same". By that Act the United States is given an opportunity to appear in the cause and is bound by the judgment which is entered. Here the statute provides that the United States may appear in the case and a prescribed written notice must be served upon the superintendent. This action was begun in the state court as authorized but no notice was given the superintendent and the United States was not made a party. This was restricted Indian land at the time of suit in which the United States had a

direct interest; the court said that the governmental interest throughout the partition proceedings is as clear as it would be if the fee were in the United States. The Government is necessarily interested in partition proceedings affecting restricted land where such course is desirable, and in seeing that the best possible price is obtained on a sale, and in re-investment of the proceeds, and is further interested in protecting the preferential right of the Secretary of the Interior to purchase the land at a sale for another Indian, as provided in Sec. 2 of the Act of June 26, 1936, 49 Stat. 1967. With such an involvement of restricted Indian lands it is not difficult to understand why Mr. Justice Douglas in the *Hellard* case referred to [38] *Minnesota v. United States*, *supra*, as affording an illustration of a similar complication in respect to restricted Indian lands, wherein it was suggested that such an involvement of restricted Indian lands would "confer by implication permission to sue the United States." But that case is so entirely different from the case now under consideration that by comparison of the facts and questions presented the actions appear to be clearly distinguishable.

Here the complainants are trying to set aside and annul a patent in fee issued to them many years ago, under authorization by Congress, on the belated claim that they never applied for or consented to the issuance of such a patent. It does not appear that permission to sue the United States has been conferred by implication in this action. If in this case the United States is not properly before the

court as a defendant, which the court has plainly indicated, then this case, like the first case, constitutes a collateral attack on the patent in fee which this court there held could not be sustained.

The further objection of counsel for defendants that no allegation is contained in the complaint bringing complainants within the provisions of Sections 352(a) and 352(b), Title 25 U. S. C. A. is sustained in this case as it was in the first.

A further discussion of the questions presented here and in the first case would seem unnecessary to reach a decision on the disposal of the motions to dismiss, and would only unduly extend the argument. In view of the attitude of the court in both cases and decision made on pertinent objections raised to the complaint, in the opinion of the court, the proper order at this time would be one of dismissal, affording the parties an opportunity for appeal and for final settlement of the questions that are impeding progress in this litigation, and such is the order of the court herein.

CHARLES N. PRAY,

Judge.

[Endorsed]: Filed Feb. 8, 1947. [39]

In the District Court of the United States
District of Montana
Great Falls Division
Civil Action No. 698

ROSE GERARD and FRED GERARD,

Complainants,

vs.

J. L. SHERBURNE and EULA SHERBURNE,
husband and wife; FRED SHUPE and MARY
DOE SHUPE, his wife, if any; GUY Mc-
CONAHA and IDA McCONAHA, his wife;
W. R. McDONALD and E. MARIE McDON-
ALD, his wife; EARL JOHNSON and MRS.
EARL JOHNSON, his wife; W. H. MERCER
and GEMMA N. MERCER, his wife, if any;
MILTON MERCER and CARMA MERCER,
his wife; G. S. FRARY and BESSIE L.
FRARY, his wife; THE UNITED STATES
OF AMERICA and all other persons unknown,
who claim or may claim some right, title, estate
or interest in the property described in the bill
in equity or complaint, or lien or encumbrance
thereon, adverse to complainants' ownership,
or any cloud upon complainants' title thereto,
whether such claim or possible claim be pres-
ent or contingent, including any claim or pos-
sible claim of dower, inchoate or accrued,

Defendants.

JUDGMENT OF DISMISSAL

Motions to Dismiss the above entitled action having been duly served and filed in said action on behalf of the defendants, G. S. Frary and Bessie L. Frary, husband and wife, and W. H. Mercer and Gemma N. Mercer, his wife, and Milton Mercer and Carma Mercer, his wife; and said Motions to Dismiss having come on regularly for hearing before the above Court on July 24, 1946, and were on said date ordered submitted on briefs and thereafter briefs having been filed on behalf of said defendants and on behalf of said complainants, and said [41] Motions and the briefs filed in support thereof and in opposition thereto having been duly considered by the Court and the Court being duly advised in the premises;

It Is Hereby Ordered, Adjudged and Decreed that said Motions to Dismiss made by said defendants herein be and the same are hereby granted and that said action be and the same is hereby dismissed with prejudice as to said defendants, G. S. Frary and Bessie L. Frary, husband and wife, and W. H. Mercer and Gemma N. Mercer, his wife, and Milton Mercer and Carma Mercer, his wife.

It Is Further Ordered, Adjudged and Decreed that said defendants have and recover of and from said plaintiffs their costs and disbursements taxed in the sum of \$10.00.

Dated this 26th day of February, 1947.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered Feb. 26, 1947.

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT AND OF FILING MEMORANDUM OF COSTS

To the above named complainants and to S. J. Rigney, Esq., their attorney of record:

You, and Each of You, Will Please Take Notice that on the 26th day of February, 1947, Judgment was entered in the above cause dismissing complainant's Complaint, a copy of which Judgment is herewith served upon you. [44]

You will further take notice that on the 26th day of February, 1947, Memorandum of Costs and Disbursements was duly filed in said action, copy of which Memorandum is herewith served upon you.

Dated this 26th day of February, 1947.

HALL & ALEXANDER, Attorneys for Defendants.

[Endorsed]: Filed Feb. 26, 1947. [45]

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND DISBURSEMENTS ON BEHALF OF G. S. FRARY, BESSIE L. FRARY, W. H. MERCER, ET AL.

Table with 2 columns: Amount Claimed, Amount Allowed. Rows include Clerk's Fees, Attorneys' docket fee, and Total \$10.00.

Costs taxed at \$10.00. March 7, 1947, in favor of G. S. Frary, et al.

H. H. WALKER, Clerk.

By C. G. KEGEL, Deputy. [47]

United States of America,
District of Montana—ss.

H. C. Hall, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendants in the above entitled cause and as such has knowledge of the facts herein set forth; that the items in the above memorandum contained are correct to the best of his knowledge and belief and that the said disbursements have been necessarily incurred in said cause and that the services charged herein have been actually and necessarily performed as herein stated.

H. C. HALL.

Subscribed and Sworn to before me this 26th day of February, 1947.

[Notarial Seal] EDW. C. ALEXANDER,
Notary Public for the State of Montana. Residing at:
Great Falls, Montana.

My commission expires: Feb. 8, 1949.

To: The Above Named Complainants and S. J.
Rigney, Their Attorney:

You will please take notice that on the 7th day of March, 1947, at Great Falls, Montana, at the hour of 10:00 o'clock a.m., application will be made to the

clerk of the above court to have the above costs and disbursements taxed pursuant to the rule of said court in such case made and provided.

HALL & ALEXANDER,
Attorneys for defendants.

[Endorsed]: Filed Feb. 26, 1947. [48]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To The Defendants, United States of America, and John B. Tansil, Esq., United States Attorney for the District of Montana, attorney for said defendant; J. L. Sherburne and Eula Sherburne, husband and wife, and Murrills & Frisbee, attorneys for said defendants; G. S. Frary and Bessie L. Frary, his wife, and H. C. Hall, attorney for said defendants; W. H. Mercer and Gemma N. Mercer, his wife, Milton Mercer and Carma Mercer, his wife, and H. C. Hall, attorney for said defendants; Guy McConaha and Ida McConaha, his wife, and Louis P. Donovan and Wilbur P. Werner, attorneys for said defendants; Fred Shupe and Louis P. Donovan, attorney for said defendant:

You, and each of you, will please take notice that the plaintiffs, Fred Gerard and Rose Gerard, above named, do [50] hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Order dismissing the complaint of the plaintiffs made and entered in this action on or about Febru-

ary 8, 1947, and the judgment dismissing said action made and entered on or about the 26th day of February, 1947.

Dated this 24th day of March, 1947.

S. J. RIGNEY,

Attorney for plaintiff and appellants, Fred Gerard and Rose Gerard.

Address: Box 186, Cut Bank, Montana.

[Endorsed]: Filed March 27, 1947. [51]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents,

That, we, the undersigned, Rose Gerard and Fred Gerard, as principals, and Brian Connolly and Mary Adams and of, Glacier County, Montana, as sureties, are held and firmly bound unto the defendants, and each of the defendants named, in the foregoing entitled action, in the sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said defendants, their successors or assigns, for which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our Seals and dated this 19th day of March, [53] 1947.

The Condition Of The Above Obligation Is Such That, whereas, in the District Court of the United States in and for the District of Montana, in the above entitled action, pending in said Court, wherein Rose Gerard and Fred Gerard are complainants and J. L. Sherburne and Eula Sherburne, husband and wife, Fred Shupe and Mary Doe Shupe, his wife, if any, Guy McConaha and Ida McConaha, his wife, W. R. McDonald and E. Marie McDonald, his wife, Earl Johnson and Mrs. Earl Johnson, his wife, W. H. Mercer and Gemma N. Mercer, his wife, Milton Mercer and Carma Mercer, his wife, G. S. Frary and Bessie L. Frary, his wife, The United States of America, are defendants, an order dismissing the action was made and rendered on or about the 8th day of February, 1947, and a judgment of dismissal of the action was made and entered therein on or about the 26th day of February, 1947; and,

Whereas, the above named complainants, Rose Gerard and Fred Gerard have filed in said action their notice of appeal from said order and judgment to the Circuit Court of Appeals of the United States for the Ninth Circuit and said complainants propose to prosecute said appeal to reverse said order and said judgment;

Now, Therefore, in consideration of said appeal, the said complainants, Rose Gerard and Fred Gerard, as such complainants, shall pay all costs if the appeal is dismissed or the order and judgment affirmed, or such costs as the Appellate Court may

award if the judgment is modified, then this obligation shall be void, otherwise to remain in full force and effect.

[Seal] ROSE GERARD,

[Seal] FRED GERARD,
Principals. [54]

[Seal] BRIAN CONNOLLY,

[Seal] MARY ADAMS,

[Seal]

[Seal]

Sureties.

State of Montana,
County of Glacier—ss.

Brian Connolly and Mary Adams and
....., residents of Glacier County,
Montana, being first severally sworn, on oath, each
for himself, deposes and says:

That they are residents and free holders within
Glacier County, Montana, and that they are worth
the amount of money specified in the foregoing
bonds as the principals thereof, to-wit: Two Hun-
dred Fifty Dollars over and above all of their just
debts and liabilities and property exempt from
execution.

BRIAN CONNOLLY,
MARY ADAMS.

.....
.....

Subscribed and sworn to before me this 19th day of March, 1947.

[Seal] PANSY CAVANAGH,
Notary Public for the State of Montana, residing at
Browning, Montana.

My commission expires March 15, 1950. [55]

State of Montana,
County of Glacier—ss.

Edward Murphy by G. A. Norman, Deputy, do hereby certify and declare as follows, to-wit: That I am the duly elected, qualified and acting Deputy Assessor of Glacier County, Montana, and that Brian Connolly and Mary Adams and
....., the sureties named in the within and foregoing bond on appeal, appear as owners of real estate and personal property upon the assessment and tax records of Glacier County, Montana, in values as follows:

- Mary Adams in the sum of \$400;
- Brian Connolly in the sum of \$3400;
- in the sum of \$.....

In Witness Whereof I have hereunto set my hand and affixed my signature as Assessor aforesaid on this 19th day of March, 1947.

EDWARD MURPHY,
Assessor of Glacier County,
Montana.

G. A. NORMAN, Deputy.

[Endorsed]: Filed March 27, 1947. [56]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL OF COMPLAINANTS, ROSE
GERARD AND FRED GERARD.

Whereas, the complainants, Rose Gerard and Fred Gerard, have heretofore filed notice of appeal in the above entitled action to the United States Circuit Court of Appeals of the Ninth Circuit from the Order dismissing plaintiffs complaint and from the judgment of dismissal rendered and entered in the above entitled action on the 26th day of February, 1947:

Now, Therefore, the said Appellants do hereby designate the following portions of the record, proceedings and evidence to be contained in the record of transcript on appeal of the above entitled cause on appeal, and respectfully request the same to be incorporated in the said transcript on appeal, to-wit: [58]

- (1) Plaintiffs complaint;
- (2) Summons;
- (3) Motion of the Defendant, United States of America, to dismiss plaintiffs complaint;
- (4) Motion of Defendants, G. S. Frary and Bessie L. Frary, to dismiss plaintiffs complaint;
- (5) Motion of Defendants, W. R. Mercer and Gemma N. Mercer and Milton Mercer and Carma Mercer, to dismiss plaintiffs complaint;
- (6) Motion of defendants, Guy McConaha and Ida McConaha, to dismiss plaintiffs complaint;

- (7) Motion of defendants, J. L. Sherburne and Eula Sherburne, to dismiss plaintiffs complaint;
- (8) Motion of defendant, Fred Shupe, to dismiss plaintiffs complaint;
- (10) Order of the court dismissing complaint filed and entered on or about February 8, 1947;
- (11) Judgment of court dismissing complaint filed on or about February 26, 1947;
- (12) Notice of entry of judgment;
- (13) Memorandum of costs on judgment dismissing complaint;
- (14) Court minutes in said action;
- (15) Notice of Appeal;
- (16) Bond on Appeal;
- (17) Entry on civil docket as to names of parties to whom Clerk mailed copies of notice of appeal and bond on appeal with date of mailing;
- (18) Designation of contents of record on appeal;
- (19) Please endorse respective dates of filing of foregoing [59] several proceedings in the above entitled court.

Dated this 24th day of March, 1947.

S. J. RIGNEY,

Attorney for Appellants, Rose
Gerard and Fred Gerard.

[Endorsed]: Filed April 5, 1947. [60]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of Montana,
County of Glacier—ss.

S. J. Rigney, being first duly sworn, on his oath deposes and says:

That on the 4th day of April, 1947, he deposited in the United States Post Office at Cut Bank, Montana, postage fully prepaid, in an envelope securely sealed, a true and correct copy of designation of contents of record on appeal, of complainants, Rose Gerard and Fred Gerard, in the above entitled action, to Louis P. Donovan, Attorney at Law, Shelby, Montana, attorney of record for the defendants Guy McConaha and Ida McConaha, his wife, and Fred Shupe; that there is regular daily communication by mail between the city of Shelby, Montana and Cut Bank, Montana.

S. J. RIGNEY.

Subscribed and sworn to before me this 4th day of April, 1947.

[Seal] NORRIS VAN DEMARK,
Notary Public for the State of Montana, residing
at Cut Bank, Montana.

My commission expires October 23, 1948.

[Endorsed]: Filed April 5, 1947. [61]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of Montana,
County of Glacier—ss.

S. J. Rigney, being first duly sworn, on his oath deposes and says:

That on the 4th day of April, 1947, he mailed with postage prepaid in an envelope at the Post Office at Cut Bank, Montana, a true and correct copy of bond on appeal and a copy of designation of contents of record on appeal of complainants, Rose Gerard and Fred Gerard, in the above entitled action to John B. Tansil, United States District Attorney attorney for defendants at Billings, Montana, there being regular mail communication between the said city of Billings, Montana, and the said city of Cut Bank, Montana.

S. J. RIGNEY.

Subscribed and sworn to before me, a Notary Public, this 4th day of April, 1947.

[Seal] NORRIS VAN DEMARK.

Notary Public for the State of Montana, residing
at Cut Bank.

My commission expires October 23, 1948.

[Endorsed]: Filed April 5, 1947. [62]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of Montana,
County of Glacier—ss.

S. J. Rigney, being first duly sworn, on his oath deposes and says:

That on the 4th day of April, 1947, he deposited in the United States Post Office at Cut Bank, Montana, postage fully prepaid, in an envelope securely sealed, a true and correct copy of designation of contents of record on appeal, of complainants, Rose Gerard and Fred Gerard, in the above entitled action, to Hall & Alexander, Attorneys at Law, Strain Bldg., Great Falls, Montana, attorneys of record for the defendants G. S. Frary and Bessie L. Frary, his wife, W. H. Mercer and Gemma N. Mercer, his wife, Milton Mercer and Carma Mercer, his wife; that there is regular daily communication by mail between the city of Great Falls, Montana and Cut Bank, Montana.

S. J. RIGNEY.

Subscribed and sworn to before me this 4th day of April, 1947.

[Seal] NORRIS VAN DEMARK,
Notary Public for the State of Montana, residing
at Cut Bank, Montana.

My commission expires October 23, 1948.

[Endorsed]: Filed April 5, 1947. [63]

CLERK'S CERTIFICATE OF TRANSCRIPT
OF RECORD

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 64 pages, numbered consecutively from 1 to 64 inclusive, constitutes a full, true and correct transcript of all portions of the record in case number 698, Rose Gerard, et al vs. J. L. Sherburne, et al, designated by the parties as the record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Twelve and 30/100ths (\$12.30) Dollars, and have been paid by the appellants.

Witness my hand and the seal of said Court at Great Falls, Montana, this 18th day of April, A.D. 1947.

[Seal]

H. H. WALKER,

Clerk, U. S. District Court,
District of Montana.

By C. G. KEGEL, Deputy. [64]

[Endorsed]: No. 11591. United States Circuit Court of Appeals for the Ninth Circuit. Fred Gerard and Rose Gerard, Appellant, vs. United States of America, J. L. Sherburne and Eula Sherburne, husband and wife, G. S. Frary and Bessie L Frary, his wife, W. H. Mercer and Gemma N. Mercer, his wife, Milton Mercer and Carma Mercer, his wife, Guy McConaha and Ida McConaha, his wife and Fred Shupe, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed April 21, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.